91-267

No.

IN THE SUPREME COURT
OF THE UNITED STATES

August Term, 1991

TYRONE REED,
Petitioner,

-vs-

THE UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the initial stop of the appellant by the narcotics officers constitute a "seizure" within the ambit of the Fourth Amendment?

2. Was the seizure of the appellant based upon a reasonable suspicion, supported by articulable facts that the appellant was engaged in criminal activity?

3. Does the illegal seizure of the appellant render the evidence found in his bag the "fruit of the poisonous tree" which must be suppressed as illegally tainted?

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TABLE OF AUTHORITIES

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

There have been no official or unofficial reports of opinions delivered in this case by other courts or administrative agencies.

IN THE SUPREME COURT OF THE
UNITED STATES

June Term, 1991

No.

TYRONE REED,
Petitioner,

-vs-

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF
CERTIORARI TO THE TENTH
CIRCUIT COURT OF APPEALS

STATEMENT OF JURISDICTION

The petitioner invokes the jurisdiction of this Honorable Court to review the decision of the 10th Circuit Court of Appeals, affirming his conviction in the Western District Court of Oklahoma. The petitioner contends the 10th Circuit Court has decided a federal question in a way that conflicts with applicable decisions of this Court. The date of entry of the judgment sought to be reviewed herein is January 31,

1991. There have been no orders respecting rehearing and there have been no orders granting an extension of time within which time to file this petition for writ of certiorari. The petitioner asserts this Court has jurisdiction to review the judgment in question by writ of certiorari, as set forth in 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

The petitioner, Tyrone Reed, traveled by bus from Los Angeles, arriving at the Oklahoma City bus station on December 13, 1989. When alighting from the bus, he attracted the attention of two Oklahoma City police detectives who were present to try and identify drug couriers bringing narcotics into the city. The facts forthcoming relevant to the petitioner's case are those established by the two detectives witnesses for the government, Detective Sergeants Ring and Hughes. As the testimony of the two officers were chiefly duplications, reference

will primaarily be made to the testimony of Officer Ring. Where it is perceived there are other pertinent facts in the testimony of Officer Hughes, an appropriate distinction is made.

Although this Statement of the Case contains a detailed recitation of the facts surrounding the arrest and conviction of the petitioner, the petitioner contends a clear distinction of the relevant facts is vital to the determination of the issues set forth herein.

The petitioner was originally arrested at the Oklahoma City Bus Station by detectives who made a daily practice of monitoring the arrival of black persons who were traveling from Los Angeles. Although the government was successful in persuading the prior courts racially discriminatory practices were an acceptable element of a drug courier profile, the petitioner urges this Honorable Court to hold othewise.

Officer Glen Ring testified that he was a twelve year veteran with four years experience in the enforcement of narcotics law. (Tr. 121). On December 13, 1990, Officer Ring testified that he was engaged in his usual daily routine, which included surveillance at the airport and the bus station, in an attempt to intercept narcotics being smuggled into Oklahoma City. (Tr. 119). He told the court that it was his practice to meet the 12:40 p.m. bus arriving from Los Angeles, a major source city for the importation of cocaine. (Tr. 119).

As a result of his training and experience in narcotics, Officer Ring stated he had developed certain "drug profiles" to identify common characteristics of drug couriers who brought in certain types of narcotics. He explained the development of these profiles to the jury, giving examples. In regard to cocaine, Officer Ring testified he looked for <u>black men</u> (emphasis supplied)

arriving on the bus originating in Los Angeles who were using carry-on luggage. Officer Ring based this profile on his belief that 99% of crack cocaine was used and imported by black people. (Tr. 123).

On the other hand, if Officer Ring wanted to intercept marijuana being smuggled in, he would look for mexicans who were arriving from El Paso, an alleged source city. If he were interested in the illegal importation of methamphetamine, he would then look for "white biker-types" the primary users of this drug, according of Officer Ring. (Tr. 192). He testified that this characterization of crime by race was the chief factor in determining smuggling of different narcotics, stating, "That's just the way it is." (Tr. 193).

Officer Ring arrived at the bus station shortly before the arrival of the 12:40 p.m. bus originating from Los Angeles. (Tr. 119). Upon their arrival, he observed three young

black males who were pacing about as if waiting for someone. (Tr. 125). One of the men appeared to be nervous, according to Officer Ring, and was engaged in "scanning". (Tr. 125). Officer Ring explained that this denoted someone who was on the lookout for narcotics officers. (Tr. 200). Officer Hughes added to this description that the men were well-dressed, wearing expensive tennis shoes, all having processed hair. (Tr. 165). Based upon these observations, Officer Ring said that he determined that these men were "players", a synonym for drug dealers. (Tr. 132.).

When the bus from L.A. arrived, according to the Officers, the appellant alighted with a small carry-on bag. (Tr. 128). According to Officer Ring, there was nothing significant about the appellant's appearance, other than the fact that he was a young black man with a carry-on bag; thusly, he fit the Officer's drug profile. (Tr. 133).

As a matter of fact, Officer Ring added that the appellant was certainly more "clean-cut" in his appearance than the officer himself. (Tr. 126). Officer Ring did note that the petitioner was dressed "poorly" compared to the other three young men, i.e., in less expensive clothing. (Tr. 129).

According to the officers, the petitioner quickly made eye contact with the other three black young males and walked over to join them. At this point, Officer Ring sought out the driver of the bus, who apparently had served as a source of information regarding his passengers, in the past. Officer Ring asked the driver if the appellant had gotten on the bus in Los Angeles, or if he had boarded at another stop along the way. The driver confirmed that the appellant had indeed traveled from Los Angeles. (Tr. 129).

Having lost sight of the group of men while questioning the driver, Officer Ring

and his partner again saw the four men walking up an alley leading from the bus station. The officers, joined by the uniformed "beat cop" then pursued their group by walking at a fast pace. (Tr. 132). The officers displayed their badges, identified themselves a police officiers and asked if they could speak with the men. (Tr. 132).

Officer Ring stated that he informed the men that they were narcotics officers who were trying to intercept drugs being brought into the city. (Tr. 133). They then asked the men to produce identification. Two of the original group of men were able to provide identification cards and one was not. The petitioner gave the officer a valid California driver's license or identification card. (Tr. 133). Officer Ring testified that the petitioner remained calm throughout the confrontation (Tr. 142).

Officer Ring then asked the petitioner if they could look in his bag. (Tr. 133).

The petitioner, according to Officer Ring, agreed and opened the bag himself and began removing articles of clothing. (Tr. 134). The officer stated that he asked the petitioner earlier why he had traveled to Oklahoma City, and he replied "for a funeral." (Tr. 143). The officer testified that when he found the package, the petitioner began to get tense and nervous. (Tr. 142). He asked the petitioner if he could open the package and the petitioner stated that it was not his. (Tr. 141). The officer then opened the package and the petitioner stated that it was not his. (Tr. 141). The officer then opened the package with a knife and located approximately two pounds of cocaine based substance inside. (Tr. 133).

The officers stated they then told the group they were under arrest and transported them to the jail. (Tr. 142-3). Eventually all of the men were released with the exception

of the petitioner. (Tr. 145). Officer Ring stated that they could not extablish knowledge and/or dominion and control of the drugs in question, due to the failure to produce any identifiable prints from the package. (Tr. 145).

The petitioner was charged in the Western District Court of Oklahoma with the crime of possession with intent to distribute 1,000 grams of a substance containing cocaine base, in violation of 21 U.S.c. 341 (A)(1). Oklahoma City is located within the Western District of Oklahoma, which has jurisdiction of violations of law of the United States.

The petitioner testified in his own behalf at the trial, reaffirming the declaration that he had traveled to Oklahoma City to attend a funeral. He stated that he was to have been met by a female acquaintance by the name of "Twyla", who was not present when he alighted from the bus (Tr. 239). The petitioner said he then caught sight of three

young black men and recognized one of them. (Tr. 239). They engaged in conversation and began walking together down the alley. The petitioner stated that one of the men had carried his bag for a short period of time before returning it to him. (Tr. 242). It was his contention that the drugs must have been placed into the bag at some point during this period of time, as the jeans in which they were found did not belong to the petitioner. (Tr. 251).

It should be noted that during the course of the trial, there was other evidence adduced which the government maintained was indicative of drug smuggling. Chiefly, the government introduced two scraps of paper, identified as Exhibits 4 and 5, which represent two halves of a bus ticket which had been torn in two. Exhibit 4 was taken from one of the original group of black men and bore the notation "$149.00". The other piece of the ticket, Exhibit 5, was taken

from the petitioner's belongings. It bore the name, "Twyla", and a phone number. (Tr. 148, 149). The government introduced evidence that the price of a bus ticket from Los Angeles to Oklahoma city was in fact, $149.00. (Tr. 151). Officer Ring also testified that he felt the significance of the name "Twyla" and the phone number appearing on the paper taken from the petitioner, was to provide the petitioner with a "contact" if he should be in such need. (Tr. 151).

Officer Ring also testified that one of the original three young black males had approximately $500.00 in cash at the time of arrest. He stated this amount of money was consistent with the usual fee paid to drug couriers smuggling in the narcotics, the logical inference being that the money was meant to be paid to the petitioner. (Tr. 158).

It is necessary to emphasize, however, that the scraps of paper, the name of "Twyla"

and the phone number, as well as the $500.00 were not discovered and seized until after the petitioner and the three other men were taken into custody.

Based upon foregoing evidence presented to the jury, coupled with the knowledge that the appellant had a former conviction for possession of cocaine, a guilty verdict was returned.

ARGUMENT

I. THE INITIAL STOP OF THE APPELLANT BY THE NARCOTICS OFFICERS CONSTITUTES A "SEIZURE" WITHIN THE AMBIT OF THE 4th AMENDMENT PROTECTION.

A. STAND OF REVIEW:

In regard to the case at bar, both of the officers called by the government testified they pursued the petitioner and his companions, because they suspected them of being participants in drug smuggling. Furthermore, the officers established it was the petitioner himself who they suspected of actually possessing the illegal narcotics. At this point in time, the petitioner's fourth Amendment rights were implicated, as the officers detained the petitioner, suspecting he might be personally involved in criminal activity. In Re Tony C., 582 P.2d 957, 148 Cal.Rptr. 366 (1978).

At the time the three officers accosted the petitioner and the others, they were displaying their badges and identifying

themselves as police officers. In addition, one of the officers was in uniform and it is reasonable to assume his service revolver was present, and the group of young men would have been aware of this fact. Accordingly, the three officers utilized a "show of authority" to restrain the petitioner and his companions, thereby accomplishing a Fourth Amendment seizure. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 29 L.Ed.2d 889 (1968); Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2572, 65 L.Ed.2d 890 (1980), Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.3d 917 (1968); U.S. v. Berry, 670 F.2d 583 (5th Cir. 1982).

The officers did require the petitioner and his companions to provide identification. By requesting identification, the argument for a Fourth Amendment seizure is strengthened, Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). In further support of this proposition, a

comparison with the facts in United States v. Robinson, 535 F.2d 881 (5th Cir. 1976), is helpful. In Robinson, two police officers were parked and waiting for two detectives, who were to have been driving an unmarked police car. The officers were parked in a predominantly black neighborhood. The officers witnessed a car similar to the one for which they were waiting drive by slowly, twice. The caught up with the car and then noted two young black males occupied the vehicle. At this point, one of the officers alighted and called in the tag number of the car to ascertain whether or not it was stolen.

The court in Robinson, concluded that this was sufficient for a "stop" (or seizure) within the meaning of the Fourth Amendment, although recognizing the men could have driven away. Thusly, it was concluded that an actual physical stop is not required, but rather a restraint of movement, accomplished

by inquiring for identification and a display of authority.

Also relevant to the case at bar, is the factual situation presented in United States v. Nicholas, 448 F.2d 622 (Eighth Cir. 1971). The police officers in this case were on routine patrol in an area noted for a high traffic in narcotics. At 11:15 p.m., they noted a black man sitting in an automobile in front of a pool hall in a predominantly black area. Another black male emerged from the pool hall and entered the automobile on the driver's side. The officers testified they wanted to question the two, as the car bore out-of-state license plates. One of the officers knocked on the passenger side of the window, where the appellant in Nicholas was sitting. When the window was rolled down, the officers stated they smelled a substance they associated with burning marijuana. Both of the men were arrested and taken into custody. Although the Eighth Circuit Court

concluded that the men could have driven away, the fact that the two officers stationed themselves around the men and displayed their badges, constituted sufficient show of authority to restrain the appellant's freedom of movement. Nicholas, id. at 624. Accordingly the police action therein amounted to a "seizure within the Fourth Amendment."

More recently, in United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) and INS v. Delgado, 466 U.S. 210, 104 S.Ct. 1748, 80 L.Ed.2d 247 (1984), the focus has shifted to an analysis based upon whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." This marks a rediscovery of tests first set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1968, 29 L.Ed.2d 889 (1968) and Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

In the fact situation herein, the petitioner and his companions were hastily pursued by three officers who accosted them in an alley, with badges prominently displayed. They were told the officers were investigating possible narcotics smuggling and were asked to show their identification. The officers then requested to look inside the petitioner's bag he had carried off the bus. It is submitted a reasonable person would not have felt free to leave, in this situation. Rather, the facts presented herein support the conclusion that the appellant was forcibly detained.

This was no chance encounter between a private citizen and an officer on routine patrol. The officers herein were present at the bus station for the specific purpose of detaining black persons who were arriving from Los Angeles, and certainly searching for contraband. The petitioner's companions were suspected of being "players" or drug dealers,

based upon their race, the way they were dressed, their hairstyles, and because one of them was looking about through the crowd at the bus station. The petitioner himself was similarly identified as a potential drug smuggler because of his race, dress, and the fact that he carried a bag off the bus, while traveling from Los Angeles. It is also apparent from the officers testimony, that none of the four would have been accosted, had they not been young black males.

As stated previously, they were speedily pursued, a show of authority by a display of badges was made, and the men were effectively informed that they were suspected of smuggling cocaine. Any reasonable person faced with the situation in which the appellant found himself would indeed have felt forcibly detained in view of the actions taken by the officers herein.

II. SEIZURE OF THE APPELLANT WAS NOT BASED UPON A REASONABLE SUSPICION SUPPORTED BY ARTICULABLE FACTS THAT THE APPELLANT WAS ENGAGED IN CRIMINAL ACTIVITY.

A. STANDARD OF REVIEW:

It is generally accepted that police officers may stop and detain an individual under certain circumstances with less than the probable cause required for an arrest. Terry v. Ohio, 392 U.s. 1, 88 S.Ct. 1968, 29 L.Ed.2d 889 (1968); Adam v. Williams, 407 U.s. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Kelly v. United States, 412 U.S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 154 (1973).

However, the circumstances required to justify such action must be sufficient to enable a police officer reasonably to suspect the particular individual is involved in criminal activity. Terry, supra; Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980); United States v. Brigoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 66 L.Ed.2d 621 (1981); Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); United States v. Brigoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); Brown v. Texas, 443 U.s. 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Lanzetti v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.2d 888 (1939).

Something more than inchoate or unparticularized suspicion or "hunch", but less than level of suspicion required for probable cause, is required, to establish a "reasonable suspicion". In Re Tony C. 582, P.2d 957, 148 Cal. Rptr. 366 (1978); Terry v. Ohio, 392 U.s. 1, 88 S.Ct. 1968, 29 L.Ed.2d 889 (1968); INS v. Delgado, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); U.S. v. Sokolow, 109 S.Ct. 1581 (1989).

Each case raising such a Fourth Amendment issue must be judged on its own facts. United States v. Mendenhall, 446 U.s. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); Florida v. Royer, 460 U.s. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

Having accepted as axiomatic the proposition that police officers may stop and detain individuals for "investigatory" purposes, with less than probable cause, the focus will be turned to an analysis of the more particularized standard of review. (See, Terry v. Ohio, id., Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); and Kelly v. United States, 412 & .S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 612 (1973).

In Brown v. Texas, 443 U.S. 52, 95 S.Ct. 2574, 45 L.Ed.2d (1979) two officers observed a defendant and another man walking away from each other in an alley which was located in an area known to have a high incidence of drug trafficking. There was no evidence

introduced that it was unusual for persons be traveling through the alley. The officers were also unable to point to any facts which objectively supported their statements that the two men looked suspicious.

The United States Supreme Court reversed the conviction in Brown, determining that the officers lacked a "reasonable suspicion" the men were engaged in criminal conduct. The fact the men were located in an area frequented by drug users, alone, was not sufficient to support a conclusion that they were engaged in criminary activity. Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980); United States v. Brigoni-Ponce, 422 U.s. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

In the instant case, the petitioner became a drug smuggling suspect based upon the officers determination he was black and he had traveled from a city which was known for cocaine exportation. Given the fact that the city of Los Angeles is one of the most

highly populated cities in these United States, the fact of citizenship alone cannot constitute a reasonable suspicion that all of its inhabitants are involved in the cocaine trade.

A key factor which the officers in the petitioner's case identified as contributing to their suspicion he was involved in drug smuggling, was the fact he was black. The officers sought to justify this distinction by the assertion only black people use crack cocaine and further grouping other races by their particular drugs of choice. Such a mentality is reminiscent of similar generalizations and attributes based on racial distinctions, espoused by groups such as the Ku Klux Klan.

Categorization of criminal suspects on appearance alone, cannot be justified. The focus is to identify criminal activity by a particular person, not a class of persons. The Fifth Circuit in United States v. Jones,

619 F.2d 494 (5th Cir. 1980) refused to lend approval to the detention of a suspect based upon his resemblance to a general description of a robbery suspect. It was pointed out that the description given could have fit many people and the defendant was not engaged in any suspicious activity when he was accosted.

More analogous to the case at bar, is a situation in which two officers of the Houston Police Department were stationed at the Intercontinental Airport to identify and intercept narcotics couriers. The officers were not acting on the basis of any specific information but were simply scanning the passengers to see if any arroused suspicion. Two men came under scrutiny intially because they were arrivng from Miami, a known source City for narcotics traffic. The men were observed to have deplaned separately but then, according to one of the officers, their eyes met and one man nodded. They moved down

the concourse, paying no attention to one another, however they were said to have been looking around nervously. The officers thusly concluded they should be followed.

The men traveled to the baggage claim area where one of the men gave the other his bag to hold, going into the restroom. He returned and the two men stood together talking until a white suitcase arrived. They then departed together. The officers followed them into the parking garage where they approached, identified themselves and asked for identification. The men complied, with one man producing tickets for both. They were said to have grown visibly more nervous. One of the officers then asked if he could search their luggage, notifying them of their right to refuse and require the officers to get a warrant. They received consent to search and found contraband narcotics within.

The Texas Court concluded that the conduct described did not supply reasonable

grounds for any level of suspicion. The court pointed out that if the men were trying to negate the implication they knew each other or were traveling together, then their obvious friendly repartee and actions subverted the purpose. The court further stated the fact the men were arriving from Miami (a source city), did not distinguish them from any other passenger on the nonstop flight. Left with the nervous behavior and furtive eye movements, the court found the actions applicable to a large category of "presumably innocent travelers." Daniels v. State, 718 S.W.2d 702 (Tex.Cr.App. 1986); citing Reid v. Georgia, 448 U.s. 438, 100 S.Ct. 2742, 65 L.Ed.2d 890 (1980).

The facts in Daniels, supra, parallel those in the petitioner's case in several respects. Initially, we have police officers who are working toward the same goal, i.e., identifying and intercepting incoming drugs and their couriers. The suspects were also using

a common means of interstate travel and traveling from cities considered to be "source" cities, by the officers in question. Lastly, there are individuals with luggage who display friendly conduct toward one another and also apprear to be nervous.

There is nothing in factual scenarios set forth above which would differentiate the subjects from an unestimable number of perfectly innocent individuals who happen to live in large cities, have an occasion to travel, are friendly and look about when ensconsed in a crowd. There is no reasonable basis to allow a police officer to suspect these "particular persons" are involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1968, 29 L.Ed.2d 889 (1968); Reid v. Georgia, 448 U.s. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980); United States v. Brigoni-Ponce, 422 U.s. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

The police officers who effectuated the

petitioner's arrest were not operating on an objective basis of identifying persons to detain and search their luggage. Their testimony supports the conclusion that they were relying upon instinct and operating upon subjective "hunches" to acheive their purpose. The Fourth Amendment proscribes such unfettered intrusion into the lives of private citizens. United States v. Cortez, 449 U.s. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); Brown v. Texas, 443 U.s. 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Lanzetti v. New Jersey, 306 U.s. 451, 59 S.Ct. 618, 83 L.Ed.2d 247 (1984); U.S. v. Sokolow, 109 S.Ct. 1581 (1989).

The use of drug profiles to identify particular suspects can be validated, if survellance of traveler's conduct produces enough circumstances to be inconsistent with "innocent travel". U.S. v. Sokolow, 109 S.Ct. 1581 (1989).

Sokolow, supra, a recent decision of this Court provides a detailed analysis of the proper use of drug courier profiles coupled with "reasonable suspicion based upon objective and articulable facts". Applying the standard of judging each case on its own individual facts, the Court reinstated a criminal conviction which was overturned by the Ninth Circuit Court of Appeals. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); Florida v. Royer, 460 U.s. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

The facts in Sokolow, supra, were as folows. In July, 1984, Andrew Sokolow went to the Honolulu Airport and purchased a two round-trip tickets for a flight to Miami leaving later in the day. The tickets were purchased in the names of Andrew Kray and Janet Norian, with open return dates. Mr. Sokolow paid for the tickets entirely with $20.00 bills; the total price was $2,100.00.

The bills were taken from a large roll comprised entirely of $20 bills estimated to be approximately $4,000.00. Also, Sokolow gave a telephone number which was listed in a name which did not match either of the two names given. The ticket agent also told officers that Sokolow appeared to be nervous during their encounter and that he and his female companion did not check any of their four pieces of luggage. The ticket agent notified DEA agents of his suspicions. Sokolow, id., at 1583-1584).

The DEA agents discovered that the the phone number was listed in the name of "Karl Herman" (who later proved to be Sokolow's roomate). They telephoned the number and the ticket agent identified a voice recording on the answering machine, as the voice of Sokolow. They were unable to find any telephone in the state of Hawaii which was listed to an "Andrew Kray".

The agents then ascertained Sokolow and

his companion were scheduled to make stopovers in Denver and Los Angeles, although they were to make their return trip to Hawaii only three days after their departure. The ticket agent had also told the agents that Sokolow as about 25 years old, wearing a black jumpsuit and expensive gold jewelry.

During the stopover in Los Angeles, DEA agents identified Sokolow, stating that he appeared very nervous and was "looking all around the waiting area." Later that same day, Sokolow and his companion returned to Honolulu; again, they did not check any of their four pieces of luggage. Sokolow was still wearing his black jumpsuit and gold jewelry.

DEA agents approached the pair as they were trying to hail a cab. One of the agents grabbed Sokolow by the arm and asked for his ticket and identification. Sokolow said that he had neither. He told agents his name was Sokolow, but he was traveling under his

mother's maiden name of "Kray".

The two were taken to a DEA office in the airport where their luggage was sniffed by "Donker" a narcotics detector dog. He alerted to Sokolow's shoulder bag and Sokolow was placed under arrest. He was advised of his constitutional rights but refused to make a statement. The agents then obtained a warrant and searched the bag, finding no drugs, but they did discover several "suspicious documents" which indicated that Sokolow was involved in drug trafficking.

The agents then allowed Donker to sniff the other three pieces of luggage. This time he alerted to medium sized Louis Vuitton bag. As it was too late to obtain another warrant, Sokolow was allowed to leave but his luggage was detained.

The following morning a second narcotics dog alerted to the same bag and the agents obtained a warrant, finding 1,063 grams of cocaine inside. Sokolow, supra at 1584-1585.

The ninth Circuit Court had reversed Sokolow's conviction, ruling that the agents lacked reasonable suspicion that he was engaged in ongoing criminal activity, at the time Sokolow was first seized on the sidewalk outside the airport.

The Supreme Court examined the facts as recited above and determined that reasonable suspicion should be determined on the basis of "the totality of the circumstances--the whole picture." United States v. Cortez, 449 U.S. 411 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Sokolow, id. at 1585. Quoting Cortez, the court said:

> "The process does not deal with hard certainities, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same--and so are law enforcement officers. Id. at 418, 101 S.Ct. at 695".

Recognizing that there are circumstances in which innocent travelers might travel

under an alias or take a course which might appear to be evasive, the Court instead focused on the probative value of other factors. Paying for the airline tickets in cash with $2,100 in only $20 bills totaling thousands of dollars, as identified as unusual for the routine traveler. Furthermore, the fact that Sokolow was traveling under an alias, while not judged individually to indicate criminal activity, coupled with the other evidence, was deemed to "warrant consideration." Id. at 1586.

Even more significant, the Court found that traveling from Honolulu alone to Miami was innocent conduct; but, traveling for 20 hours to Miami, remaining only 48 hours, during the month of July, was deemed to be unique conduct. While the above referenced factors taken individually would not have been enough to raise "reasonable suspicion", the combination or "totality of the circumstances", did rise to the level of

"reasonable suspicion based upon articulable and objective factors". Sokolow, supra at 1586.

Applying the circumstances of the petitioner's case in their "totality", there is no behavior identified as inconsistent with innocent travel.

The fact that three young black men were nicely dressed and waiting for a bus, is not suspicioius activity. Travelers are met everyday by groups of people. If one of the men appeared nervous and was scanning the crowd, such behavior in Sokolow above was determined by the Supreme court to be normal and innocent behavior.

Lastly, the fact the petitioner traveled from a known source city while carrying his one piece of luggage is not suspicious activity. Certainly hundreds if not thousands of people depart from Los Angeles by bus on a daily basis. It is also quite common for bus travelers to take carry-on

luggage. The trip by bus from Los Angeles to Oklahoma City is extremely long and it would seem to be normal to take along a bag with snacks, reading material and/or clothing. The fact that the appellant had no other luggage indicates nothing more than his intent to stay a short time only, or that he possessed few personal items.

This leaves us with only the fact that the appellant and his friends were black males, who the officers herein identified as the class of people, actually the only racial class, involved in trafficking in cocaine. If this is to be labeled as "reasonable suspicion" it is clear that this class will be denied the equal protection guarantees of the Fourteenth Amendment, and subjected to unreasonable search and seizure. Even when combining all of the above factors to view the "totality of the circumstances", all of these remain consistent with innocent travel.

This court has consistently repudiated

"[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." Hirabeyaski v. United States, 320 U.S. 81, 100 (1943). It has further recognized, at the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944). If such different treatment based upon racial distinctions, only, are ever to be upheld, they must be shown to be necessary for the accomplishment of some permissible state objective, independent on the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Members of this Court have previously stated that they "cannot conceive of a valid...purpose which makes the color of a person's skin the test of whether his

conduct is a criminal offense." McLaughlin v. Florida, 323 U.S. 198 (1948).

Although we are not dealing with the application of a racially discriminatory criminal statute, the petitioner urges the same level of scrutiny is appropriate herein, when faced with racially discriminatory application of the Fourth and Fourteenth Amendments. Wholesale confrontation, detainment and warrantless search of certain individuals conducted only upon selected persons of the black race, is blatant racial discrimination.

The petitioner herein prays this Honorable Court will condemn the use of racially discriminatory enforcement of the law and thereby provide this petitioner and those of his race with equal protection by forbidding the application of "drug courier profiles" which contain race as the chief element of identification.

III. THE ILLEGAL SEIZURE OF THE APPELLANT RENDERS THE EVIDENCE FOUND IN HIS BAG THE "FRUIT OF THE POISONOUS TREE", WHICH MUST BE SUPPRESSED AS ILLEGALLY TAINTED.

The "fruit of he poisonous tree" doctrine serves to exclude as evidence not only the direct products but also the indirect products of Fourth Amendment violations. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 9 L.Ed.2d 441 (1963); Weeks v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 652 (1963). Voluntary consent is simply a threshhold inquiry only. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 .Ed.2d 416 (1975); Dunaway v. New York, 422 U.S. 214, 99 S.Ct. 2248 (179). The threshhold inquiry is whether or not the evidence was obtained by exploitation of illegality of seizure or arrest. Wong Sun, supra; Brown, supra; Dunaway, supra.

It should be noted herein the petitioner's attorney at trial objected to

the admission of the evidence obtained through the illegal seizure of the petitioner. (Tr. 220).

In the case at bar, it is clear the petitioner's initial detention was a "seizure" which was not based upon "reasonable suspicion and objective articulable facts". It is therefore contended the seizure was illegal for Fourth Amendment purposes.

It is equally clear the purpose of the officers in stopping the petitioner was to ascertain the contents of the bag which he carried. Consequently, the bag seized was the "direct product" of the Fourth Amendment violation. Wong Sun v. United States, Weeks v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 652 (1963).

Although the officers testified the petitioner voluntarily opened his bag and removed the contents, voluntariness is merely a threshhold inquiry. Brown v. Illinois, 422

U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); Dunaway v. New York, 442 U.S. 214, 99 S.Ct. 2248 (1979).

The "fruit of the poisonous tree" doctrine requires that the bag be suppressed as the product of a Fourth Amendment violation. Wong Sun, id.; Weeks, id.

It is also arguable that when Officer Ring chose to "help" the petitioner with his unpacking, because he thought the petitioner was "protecting an area", the officer performed a warrantless search. The officer felt a package in a pair of pants that he picked up, and withdrew the cocaine, then opened it with his knife. Such warrantless search also breaches Fourth Amendment guarantees.

The facts as artculated in the appellant's case established the evidence was obtained through an exploitation of the illegal seizure of the appellant. According, this evidence should have been suppressed and not admitted into the petitioner's trial.

CONCLUSION

WHEREFORE, based upon the facts, citations of authorities and the argument set forth herein, the petitioner Tyrone Reed respectfully requests this Honorable Court reverse the conviction heretofore incurred; suppress the evidence illegally seized from the appellant; and for such further relief as is deemed just and equitable.

Respectfully submitted,

By: _____

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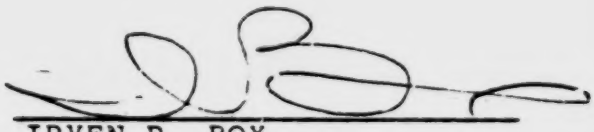
CERTIFICATE OF SERVICE

This is to certify that on the 9th day of August, 1991, a true and correct copy of the above and foregoing document was mailed first-class, postage prepaid to: THE SOLICITOR GENERAL OF THE UNITED STATES, Department of Justice, Washington, D.C. 20530.



IRVEN R. BOX

APPENDIX

Attached hereto are Exhibits A & B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
	)	No. 90-6205
-vs-	)	(D.C. No. 90-40-T)
	)	(W.D. Okla.)
RYRONE REED, Defendant-Appellant.	)	

ORDER AND JUDGMENT

Before Holloway, Chief Judge, and BARRRETT, and TACHA, Circuit Judges.

This appeal is from the denial by the district court of defendant Reed's motion to suppress evidence seized after a top of the defendant and search of his luggage at a bus station. Defendant appeals on the grounds tht the initial stop was an unconstitutional seizure of his person and therefore that the evidence obtained following the seizure was obtained in violation of defendant's Fourth Amendment rights and should be suppressed. We affirm.

(EXHIBIT A)

Two Oklahoma City law enforcement officers, in plain clothes without badges, stopped defendant after he got off a bus in Oklahoma City and met three other young men in the bus station.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

The officers introduced themselves as police officers and advised the group that they were monitoring passengers on that particular busline because of the frequency of drug traffic on that route. Defendant was asked for identification, which he produced. One of the officers then asked whether he could search defendant's carry-on bag. Defendant consented. The officer knelt down,

opened the bag, and, among the articles of clothing, found a package that contained cocaine. It is this evidence that defendant sought to suppress in the district court.

In our view, the officer's initial stop of defendant and request for identification was merely a police-citizen encounter and was characterized by defendant's voluntary cooperation in response to noncoercive questioning. Such a stop raises no constitutional issues because this contact is not a seizure within the meaning of the Fourth Amendment. See United States v. Bell, 892 F.2d 959, 965 (10th Cir. 1989), cert. denied, 110 S.Ct. 2618 (1990). Defendant Reed then gave consent to the search of his luggage. Defendant makes no argument that his consent was involuntary or other than knowing and voluntary

consent. Therefore, we find that defendant's Fourth Amendment rights have not been violated. See id. The order of the district court is AFFIRMED.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge
(Filed 1/31/91)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, -vs- TYRONE REED, Defendant.	)	Case No.CR-90-4-T

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

THE DEFENDANT: was found guilty on count one (1) - Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count, which involves the following offenses:

TITLE & SECTION 21:841(a)(1)

POSSESS WITH INTENT TO DISTRIBUTE APPROXIMATELY 1,000 GRAMS OF SUBSTANCE CONTAINING COCAINE BASE.

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed

(Exhibit B)

pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. No. 568-17-3997

Defendant's mailing address: Oklahoma County Jail, 123 Park Ave., Okla. City, OK 73102

s/ Ralph G. Thompson
United District Judge
Dated May 18, 1990

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 292 months.

The Court makes the following recommendations to the Bureau of Prisons: F.C.I. in CA

The defendant is remanded to the custody of the United States Marshall.